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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EDWARDS, et al.,

Petitioners,

v.

SOJOURNER T., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Brief of **TEXAS BLACK AMERICANS for LIFE** as *Amicus Curiae* in Support of Petitioners Edwards, et al.

Lawrence J. Joyce
Pharmacist/Attorney-at-Law
Counsel of Record

Craig H. Greenwood
Of Counsel

6203 N. Keeler Ave.
Chicago, IL 60646

(312) 286-7986

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INTEREST OF THE *AMICUS*

The *amicus* Texas Black Americans for Life is an organization which is concerned about the use of abortion as a tool of racial genocide against the African-American community. This brief is being filled with the consent of all of the parties.

SUMMARY OF ARGUMENTS

The newly elucidated facts concerning fetal pain, and recent developments in fetal surgery, require a reexamination of *Roe v. Wade*.

This Court recognized in *Dred Scott* that the federal government lacks the authority to compromise state personhood for purposes of state law. This issue is particularly compelling now, when Congress is poised to pass the so-called Freedom of Choice Act, which would negate state regulations concerning abortion found constitutional in *Webster v. Reproductive Health Services* and *Planned Parenthood v. Casey*.

ARGUMENTS

I. THE NEWLY ELUCIDATED FACTS CONCERNING FETAL PAIN, AND RECENT DEVELOPMENTS IN FETAL SURGERY, REQUIRE A REEXAMINATION OF *ROE v. WADE*.

A. There Are New Facts Concerning Fetal Pain.[1]

In *Planned Parenthood v. Casey* this Court noted that a change in the facts as they are known about an issue constitutes a basis for reexamining precedent. ___U.S. ___, 112 S.Ct. 2791, 2809, 2811-2814, 120 L.Ed.2d 674, 700, 705-706 (1992). We wish to advise the Court of certain facts concerning unborn children's perception of pain which were unknown in 1973 when this Court decided

1.) We wish to thank Dr. Ronald E. Harbut, M.D., Ph.D., Director of Anesthesia, Page Hospital, Page, Arizona, past Assistant Professor of Anesthesiology, University of New Mexico, for his invaluable assistance in preparing this material.

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). In fact, though this new body of facts began developing in the 1980's, the broad publicizing of these facts has reached a crescendo only within the past year.

The May, 1992 issue of Anesthesiology News reported that unborn children feel pain. The article said,

> "For decades, conventional wisdom, but not hard evidence, held that infants' immature nervous systems prevented them from fully experiencing noxious stimuli. There was also undocumented concern about the safety of infants receiving adequate anesthesia and analgesia: that the risks of hemodynamic and ventilatory instability associated with potent anesthetics outweighed the benefits.
>
> "In recent years, however, it has been clearly demonstrated that *even young preterm infants* have the capacity to feel pain. There is *convincing* evidence, in fact, that the 'hard wiring' capacity for nociception [pain perception] is present not only at birth but *in late fetal life.* The often-cited incomplete myelinization in infants may be offset by the smaller interneuronal distances that nociceptive impulses need to travel to reach the higher centers, said Dr. [Lonnie K.] Zeltzer [the director of the UCLA pediatric pain program]."[2] [emphasis supplied]

The article also noted that recent "...biochemical and anatomic findings support the view that newborns can *and do* experience pain *just as adults do.*" *Id.* [emphasis supplied] The article, quoting Dr. Zeltzer directly, also said,

> " 'We *owe* it to infants who cannot express their pain to be observant, to look for physiologic indicators of pain, *in particular, to know that even in the very young preterm*, the capacity for nociception is there and that pain needs to be treated.' " *Id.* [empha-

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2.) *Capacity To Perceive Nociceptive Pain Believed Present as Early as Late Fetal Life and Birth*, Anesthesiology News, May, 1992, at 5.

sis supplied]

The article discussed pain perception even in nonviable fetuses, saying,

> "There is also data that the anatomic substrate for pain is present in fetal life, *as early as 20 weeks' gestation*, Dr. Zeltzer told listeners. During late fetal life and the newborn period, the density of cutaneous nociceptive nerve endings *equals or exceeds* that in adult skin." *Id.* [emphasis supplied]

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> "There are indeed changes in pain perception that occur with age, she said. However, these changes are more related to alterations in behavioral manifestations of pain: to an increasing ability to anticipate pain and also to modulate pain, and to an increased emotional component of the pain response." *Id.*

All of this "provides the rationale for pain treatment even in *very* young preterm infants." *Id.* [emphasis supplied]

The article discussed research which has shown that inadequate anesthesia in term and preterm infants results in an increased stress response, a greater rate of complications, and higher mortality. *Id.* It also noted that exposing such children to painful stimuli without anesthesia leads to increased pain vulnerability in later life; this apparently is due to changes in the "wiring" in the neuronal nociceptive pathways which occurs in such children. *Id.*

An accompanying piece in that same issue asked five anesthesiologists the following question:

> "Do we need to provide pain relief to neonates and infants the same way as in adults?"

The answers are revealing:

1.) "Unequivocally, yes. Many people, particularly the older generation of surgeons, are of the firm opinion that neonates do not experience pain. Of course this is totally untrue..." [Dr. Edmond C. Bloch, Chief of Pediatric Anesthesia, Duke University, Durham, North Carolina].

2.) "We need to provide the same pain relief to neonates and infants as we do for adults, since children are considered our most precious possession." [Dr. Linda Jo Rice, Assoc. Prof. of Anesthesiology, Children's Hospital National Medical Center, Washington, DC].

3.) "Absolutely." [Dr. William B. McIlvaine, Pediatric Anesthesia Consultants, Denver, Colorado].

4.) "I believe it is vital to provide pain relief because neonates and children are real people." [Dr. Hernando De Soto, Chairman, Dept. of Anesthesiology, Riverside Hosp. and Clinic, Jacksonville, Fla.].

5.) "There is absolutely no question that neonates and infants perceive pain. So the question is: are there any reasons not to provide pain relief? To my knowledge, there are none." [Dr. Peter J. Davis, Assoc. Prof. of Anesthesia, Children's Hosp. of Pittsburgh].[3]

The textbook Principles and Practice of Anesthesiology is in accord. (The material quoted here is from the new, first edition of that book, which is listed as the "1993" edition.) It reads:

> **"Except for extraordinary circumstances, all newborns require anesthesia for surgery.** [citations omitted] **In the past, it was assumed that newborns neither experienced nor perceived painful stimuli to the same degree as adults.** [citations omitted] **Most believed that newborns did not have the neurologic substrate necessary for the perception of pain, either because of a lack of myelinization, incomplete pain pathways from the periphery to the cortex, or im-**

3.) *ROVING* REPORTER, Anesthesiology News, May, 1992, at 4.

> **maturity of the cerebral cortex. Absolutely no evidence indicates that any of this is true. Newborns respond to noxious stimuli with behavioral, physiologic, metabolic, and hormonal responses suggestive of substantial stress.** [citations omitted] Also, *clearly* the neurophysiologic pathways for nociception from the peripheral receptors to the cerebral cortex are developed *even in premature infants*. Furthermore, the primary pathways of pain transmission involve nonmyelinated C and A delta fibers, so postnatal myelination is not required for most pain perception. [citations omitted] Finally, failure to provide anesthesia is associated with an increased incidence of circulatory, respiratory, and metabolic complications in newborns. [citations omitted] Thus most evidence suggests that newborns not only respond to noxious stimuli, but that the failure to provide analgesia and anesthesia significantly increases perioperative morbidity and mortality."[4] [emphasis supplied] [Note: The portions in bold face here are printed that way in the text itself.]

We take particular note of the fact that this passage refers to potential "failure to provide anesthesia" and "failure to provide analgesia and anesthesia". But how can there be a failure to provide analgesia and anesthesia in the absence of a duty to provide them? And how can there be a medical duty to provide them if infants (even "premature infants", in the words of the text) are not persons? Thus it is left up to the legal community to devise some distinction between those who experience pain and suffering in the womb as opposed to those who experience it outside of the womb. But we have yet to see any rational distinction drawn between these two by anyone.

Consider also the following statement from a paper presented to a continuing education seminar in anesthesiology in June, 1992:

4.) Myron Yaster, *Anesthesia for Surgical Emergencies in Newborns, in* Principles and Practice of Anesthesiology, Vol. 2, Chap. 82, 2137 (Mark C. Rogers, et al. eds. 1993).

"For many years minor operations (e.g. circumscision [sic]) and even major surgery (e.g. ligation of patent ductus arteriosus) were performed on newborn patients without the use of any anesthetic or analgesic drugs. *We now know that this was wrong.* There is *convincing* evidence that the neonate can appreciate, and does respond adversely, to [sic] the pain of surgery. The use of adequate general or regional anesthesia and postoperative analgesic drugs will modify these responses to surgery and will improve the clinical outcome following surgery. *It is now a declared principle that the neonate should be considered for anesthesia on the same basis as older and adult patients; ie* [sic] *the decision to administer drugs is based on the physical state of the patient and not upon the maturity."*[5] [emphasis supplied]

It is worth emphasizing that the above statements all come from a news publication, a continuing education seminar, and a brand new textbook, each of which is designed to advise colleagues in the field not of old data or old news, but of the very latest developments in the field. In fact, it is worth noting that the paper from the continuing education seminar quoted above was presented to that seminar the very weekend before this Court announced its opinion in *Planned Parenthood v. Casey*.

These statements confirm what advocates of the rights of unborn children had been saying all along. For instance, in 1984 Dr. Vincent Collins, M.D., a professor of anesthesiology at Northwestern University, sent President Reagan a letter defending Mr. Reagan's assertion that unborn children feel the pain of an abortion. Excerpts of this letter, which was co-signed by two past presidents of the American College of Obstetricians and Gynecologists, were published in the Feb. 24, 1984 edition

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5.) David J. Steward, *Anesthesia for Neonates and the Grown-Up Premie, reprinted in* American Society of Anesthesiologists Regional Refresher Course, San Diego, Calif., June 27-28, 1992, 204, at 1. (Note: This paper is mistitled *Anesthesia for Neonates in* [sic] *the Grown-Up Premie* in the collection of papers presented to that seminar.)

of American Medical News. The letter read in part:

> "A fetus shows the precise behavior as you or I in avoiding pain. It is not a reflex, but an actual aversion to a needle or chemicals. He squirms away from any noxious influence."[6]

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"You stand on firmly established ground." *Id.*

In support of this Dr. Collins pointed out that:

1.) The cortex is developed between four and five weeks of age.

2.) Reflex actions can be observed between four and six weeks of age.

3.) Brain waves are detectable between six and seven weeks.

4.) Nerves connecting the spinal cord to peripheral structures have developed between six to eight weeks.

5.) Adverse reactions to stimuli are observed between eight and 10 weeks.

6.) Neurotransmitters capable of sending pain signals to the brain are present at 12 weeks.

7.) Opiate receptors, designed to provide analgesia, can be seen at 12 weeks. *Id.*

Dr. Collins also pointed out that in a saline abortion, unborn children feel "the same agony as an adult who has suffered burns over 80% to 90% of his body." As a result, the unborn child "squirms, throws himself around, and shows a total grimacing patterns [sic] of withdrawal." *Id.*

6.) *MD group claims that aborted fetuses suffer pain*, American Medical News, Feb. 24, 1984, at 15.

Dr. Matthew Bulfin, M.D., of Lauderdale by the Sea, Florida, added, "You can tell by the contours on their faces that aborted fetuses feel pain." *Id.*

At the very least, the states must be allowed to prohibit nontherapeutic experiments from being performed on those human lives within their jurisdictions who depend on the state for protection and who can feel the pain of the harm inflicted on them. The states must be allowed to regulate abortions in a manner which will provide a medical duty to administer anesthesia to the unborn before they are aborted.

B. There Are Recent Developments In Fetal Surgery.

A recent breakthrough in fetal surgery demonstrates the increasing need to allow the states to acknowledge the personhood of unborn children.

The mother herself was in no danger. Her child was. He was only 24 & 1/2 gestational weeks old, and he had a diaphragmatic hernia. This meant that his internal organs had entered the space in which his lungs were supposed to develop, preventing either lung from doing so. But his surgeons tried a new technique.

To begin with, in their own words, they gave "anesthesia for both mother and fetus".[7] They then drained and preserved the amniotic fluid, whereupon they performed the life-saving surgery on the child. The amniotic fluid was then replaced and the child was delivered by cesarean section 7 & 1/2 weeks later, at 7 & 1/2 months gestational age.

They did a follow-up, noting that at eight months after delivery "the baby is at home, growing and developing normally." *Id.* Significantly, in order to access the area which needed the surgery, they had to lift the child's arm out of the womb. *Id.*

7.) Michael R. Harrison, et al., *Successful Repair In Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax*, 322 The New England Journal of Medicine, 1582 (1990).

During the time of his surgery, with the amniotic fluid drained, one arm lifted out of the womb, and a team of skilled specialists performing the most technically advanced surgery known at that time on his internal organs, was this patient (at that time a viable fetus) a nonperson? And if he was a person then, did he later become a nonperson again when his arm was placed back in the womb, the amniotic fluid restored, and the womb closed back up? Or what?

C. There Is A Secular Reason For Acknowledging The Personhood Of Unborn Children.

A failure to recognize the personhood of unborn children has already led to the performing of ghastly experiments on unborn children; these began long before the recently discovered facts concerning pain perception by unborn children became known.[8] But unfortunately, the desire in the scientific community to further use unborn children for experiments does not seem to be abating.

The legal community may content itself to divide unborn children into different classes of persons for certain purposes but not for others. But in the medical community there are no legal fictions, only patients. No doctor ever had a legal fiction for a patient. No further schooling is needed by an M.D. in order to treat an unborn child. For only veterinarians have nonhuman patients.

Certain members of this Court have insisted upon there being a "secular purpose" for acknowledging the personhood of unborn children in order to satisfy the re-

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8.) In 1973 Dr. Peter A. J. Adam of Case Western Reserve University in Cleveland, Ohio, announced that he had gone to Helsinki and had severed the heads of twelve aborted children age twelve to twenty weeks of gestation and had kept them alive with fluids and a pump in order to perform experiments on them pertaining to carbohydrate metabolism. In response to objections concerning the ethical implications of such practices he replied, "[O]nce society has declared the fetus dead and abrogated its rights, I don't see an ethical problem..." *Post-abortion fetal study stirs storm*, Medical World News, June 8, 1973, at 21.

quirements of the First Amendment.[9] We hope this material will be of assistance to the Court.

D. Liberty Finds No Refuge In This Jurisprudence Of Doubt.

In *Planned Parenthood v. Casey* this Court said,

"Liberty finds no refuge in a jurisprudence of doubt." *Casey, supra,* ___U.S. at ___, 112 S.Ct. at 2803, 120 L.Ed.2d at 693.

If this Court does not allow the states to acknowledge the personhood of unborn children now, it will only needlessly put off the day when it must do so perforce. For the ever increasing awareness of the fetus as a patient will continually impeach the soundness of *Roe's* mistaken factual base, meaning that the uncertainty of *Roe's* continued validity can only grow more shaky as time goes on.

II. THIS COURT RECOGNIZED IN *DRED SCOTT* THAT FEDERAL COURTS LACK THE AUTHORITY TO COMPROMISE STATE PERSONHOOD FOR PURPOSES OF STATE LAW.

In *Dred Scott v. Sandford*, which denied the personhood of black slaves within the meaning of the federal constitution, this Court said,

"In discussing this question, we must not con-

9.) *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2849, 120 L.Ed.2d 674, 751 (1992) (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part); *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2839, 120 L.Ed.2d 674, 739 (1992) (Stevens, J., concurring in part and dissenting in part); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 778-779, 106 S.Ct. 2169, 2188, 90 L.Ed.2d 779, 805 (1986) (Stevens, J., concurring); *Webster v. Reproductive Health Services*, 492 U.S. 490, 552-553, 109 S.Ct. 3040, 3075, 106 L.Ed.2d 410, 458-459 (1989) (Blackmun, J., concurring in part and dissenting in part); *Webster v. Reproductive Health Services*, 492 U.S. 490, 565-572, 109 S.Ct. 3040, 3082-3085, 106 L.Ed.2d 410, 467-471 (Stevens, J., concurring in part and dissenting in part).

found the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has *all the rights and privileges* of a citizen of a State, that he must be a citizen of the United States. He may have *all of the rights and privileges* of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. *For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights.* But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. *Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons;* yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, *although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character." Dred Scott v. Sandford,* 60 U.S. (19 How.) 393, 405-406, 15 L.Ed. 691,

700-701 (1857). [emphasis supplied]

This Court went on to say,

> "The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, *leaving it altogether with the several States* to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require. The States evidently intended to reserve this power *exclusively* to themselves." 60 U.S. at 426, 15 L.Ed. at 709. [emphasis supplied]

This Court made these statements despite the fact that this Court also expressly referred to black slaves as "an inferior class of beings" (60 U.S. at 405, 15 L.Ed. at 700), and "beings of an inferior order" (60 U.S. at 407, 15 L.Ed. at 701).

This Court's complete acceptance of the full rights of state persons against all the rights of all other persons in state court is made emphatic by this Court's rejection of such rights for state persons in courts outside of the state which recognized such personhood. This Court said,

> "It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Consitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.
>
> "The question then arises, whether the provisions of the Constitution, in relation to the per-

> sonal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

"The court think the affirmative of these propositions cannot be maintained." 60 U.S. at 406, 15 L.Ed. at 701.

Significantly, in 1820 the Supreme Court of Mississippi was faced with the question of whether a man who had killed a black slave could be prosecuted for murder. The unanimous court, citing uncontradicted authorities from other slave states for support, held that he could, saying,

> "Is not the slave a reasonable creature, is he not a human being, and the meaning of this phrase reasonable creature is a human being, for the killing a lunatic, an idiot, or even a child unborn, is murder, as much as the killing a philosopher, and has not a slave as much reason as a lunatic, an idiot, or an unborn child?" *State v. Jones*, 2 Miss. (1 Walker) 39, 40 (1820).

Thus we see that a slave state equated an unborn child with all other persons, including a black slave, whom this Court found in *Dred Scott* to be someone whom a state could confer all of the rights and privileges of the law on in its own courts, free from federal interference.

It is not possible to say, as this Court did in *Roe*, that the states may not now do this without also saying (however unwittingly) that the *Dred Scott* decision *went too far* to the extent that it *would* allow one to have one's rights recognized under the law (*Roe, supra,* 410 U.S. at 162, 93 S.Ct. at 731, 35 L.Ed.2d at 182); it is to say also that the *Dred Scott* decision *did not go far enough in denying* one the right to have one's rights recognized under the law. And the statement of this Court in *Roe* that this is somehow accomplished by the Fourteenth Amendment is untenable on its face. (*See,* 410 U.S. at 152-162, 93 S.Ct. at 726-731, 35 L.Ed.2d at 176-182.)

This does not mean, as Justice Stevens suggests, that the states have the right to impinge on a federal natural person's First Amendment right to publish by declaring trees to be persons, and endowing trees with the right not to be killed (thereby effectively ending all publishing). *Planned Parenthood v. Casey*, ___ U.S. ___, n. 2, 112 S.Ct. 2791, 2839, n. 2, 120 L.Ed.2d 674, 739, n. 2 (1992) (Stevens, J., concurring in part and dissenting in part). For this Court has never had any trouble distinguishing between the rights which a natural person has and those which an artificial person, such as a corporation, may have.

This Court has noted, for instance, that an artificial person has no Fifth Amendment right against self-incrimination. *U.S. v. White,* 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944). (But a corporation may be said to exercise a First Amendment right to free speech. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).) Similarly, a tree has no life of a natural person (i.e. a human life) which could be violated, even though it could be considered to be a person for virtually all other purposes. And, as noted above, this Court had no objection in *Dred Scott* to the states' placing "beings of an inferior order" on an equal footing in state court with those who enjoy federal personhood. (See pages 10-12, *supra.*)

The only question, then, is whether it is rational for a state to acknowledge the natural personhood of an

unborn child.

A. The State Of Louisiana's Acknowledgment Of The Personhood of Unborn Children Is A Rational Exercise Of State Sovereign Authority.

On the basis of the aforementioned newly elucidated facts concerning fetal pain, and the recent developments in fetal surgery, we submit that it is rational for the State of Louisiana to acknowledge the natural personhood of unborn children.

There are three other aspects of sovereign state authority in the field of abortion which we wish to discuss.

First, we wish to discuss a comment which the petitioners made in the petition itself. They noted that it was the case in Louisiana up until 1805 that the mother herself could receive the death penalty for procuring the abortion of her child. (Pet. at 26-27.) What this means in practical terms is that this provision was repealed almost immediately after Louisiana was purchased from France.

Consider this in light of the case in which this Court recognized that there is no constitutional right to engage in homosexual sodomy. Justice Powell filed a concurring opinion in which he noted that a penalty of incarceration for engaging in such conduct would raise a serious Eighth Amendment question. *Bowers v. Hardwick*, 478 U.S. 186, 197-198, 106 S.Ct. 2841, 2847-2848, 92 L.Ed.2d 140, 150-151 (1986) (Powell, J., concurring). The same wisdom applies here. To take the opposite approach would require this Court to strike down laws against spitting on the sidewalk simply because some state might someday prescribe the death penalty for such conduct.

Spitting on the sidewalk might become a capital offense someday in some state, but this does not go to the broader question of whether the states may prescribe some sanctions of some kind for engaging in such conduct. And we note that the State of Louisiana has no de-

sire now to impose the death penalty on women who procur an illegal abortion, nor has it done so for over 185 years.

Second, it is worth noting that although the recognition of state sovereign authority which the State of Louisiana is seeking here would, on its face, allow the states to proscribe abortion even if the mother's life were in danger, any such legislation would be unconstitutional, for it would fail the rational basis test. For if the mother dies, so also does her unborn child. We hope this addresses the concerns of Justice Blackmun on this point. *Planned Parenthood v. Casey*, ___U.S. ___, 112 S.Ct. 2791, 2854, 120 L.Ed.2d 674, 757 (1992) (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part.

Third, we also note that this Court was concerned in *Planned Parenthood v. Casey* that without the *Roe* analysis, women could be forced to undergo abortions against their will. *Casey, supra*, ___ U.S. at ___, 112 S.Ct. at 2811, 120 L.Ed.2d at 703. But as Justice O'Connor pointed out in a case involving the other end of life's spectrum, any such action of this nature would constitute a classic example of a forcible restraint of one's liberty; it would also constitute an intrusion into one's body of the type that would burden the woman's liberty, dignity, and freedom to determine the course of her own life. Thus, it would run afoul of this Court's previously stated notions of constitutionally permissible state action. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 287-289, 110 S.Ct. 2841, 2856- 2857, 111 L.Ed.2d 224, 247-249 (1990) (O'Connor, J., concurring).

B. Federal Courts Lack The Authority To Grant The Relief Requested In This Case.

Since the jurisdiction of federal courts is limited rather than general, a federal court must not only have jurisdiction to hear the case, it must also have jurisdiction to grant the relief requested. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 2171 (1985); *Pennhurst State*

School and Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 267 (1984) (*Pennhurst II*). The statements of this Court in *Dred Scott* are too clear to admit of any doubt that the District Court lacked the authority to grant the relief requested.

C. This Court Has Recognized Its Own Affirmative Duty To Notice Defects In Its Jurisdiction Or That Of The Courts Below.

The petitioners themselves have drawn this Court's attention to the sovereign (i.e. Tenth Amendment) right of the states to acknowledge the personhood of unborn children for purposes of state law. (Pet. at 22-30.) To this we would add the following.

Consider, for example, this Court's landmark case of *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), which overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842). At no time did Erie Railroad Company raise any issue of whether federal courts had the authority to do what they were doing in that case; on the contrary, Erie Railroad Company stated, "We do not question the finality of the holding of this Court in *Swift v. Tyson*... ." (Brief on Behalf of Petitioner Erie Railroad Company at 27.) Yet consider the opening statement of the opinion of this Court in *Erie*:

> "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved." 304 U.S. at 69, 58 S.Ct. at 818, 82 L.Ed. at 1189.

This Court went on to say in that case that federal courts in fact do not have the authority to impose their own common law on parties in a case based on diversity of citizenship jurisdiction, overruling *Swift v. Tyson*.

More recently, this Court obtained the same result in a similar manner. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986).

It is one thing to say, as this Court said in *Planned Parenthood v. Casey*, that this Court will not revisit a

prior holding simply because the members of this Court do not know whether they would have agreed with the Court's judgment and opinion were the matter before the Court in the first instance. *Casey, supra,* ___U.S. at ___, 112 S.Ct. at 2817, 120 L.Ed.2d at 711. But in *Casey* this Court took no notice of a potential defect in the authority of federal courts to grant the relief requested. And where there is an issue of a lack of authority to act, ordinary considerations of procedure in reviewing the order of a court below find no application. As the Third Circuit once said,

> "To affirm an order or judgment not within the judicial power of the United States would be as serious a usurpation as issuing such an order in the first instance." *Page v. Schweiker*, 786 F.2d 150, 153 (3rd Cir. 1986).

This same approach formed the underlying premise of this Court's action in *Erie*. In the instant case, we ask this Court to take notice of the lack of authority of the District Court to grant the relief requested.

D. Proposed Action On The So-Called Freedom Of Choice Act Makes This Issue Particularly Compelling Now.

This issue takes on particular importance at this time, when the United States Congress is debating, and may soon pass, the so-called Freedom of Choice Act, which would negate provisions of state law regulating abortion similar to those found permissible by this Court in *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), and *Planned Parenthood v. Casey, supra*.

Thus, if this Court does not overrule *Roe* and simultaneously mention the sovereign right of the states to endow whomsoever they choose with legal rights and interests for purposes of state law, this Court will allow a needless constitutional clash to ensue.

It would be in the best interests of federalism, comity, and judicial economy to state beforehand what the basis

is of the states' right to protect the unborn. Such a statement could prevent needless litigation over what can only eventually prove to be a vain exercise of authority by Congress. In this way it will be less likely that the people will be misled as to which direction our law is taking.

CONCLUSION

The State of Louisiana is only one state; but it is not less than one state. In recognition of its sovereign status as a state, and the rationally based need to allow the states to acknowledge the personhood of unborn children, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Lawrence J. Joyce
Pharmacist/Attorney-at-Law
Counsel of Record
6203 N. Keeler Ave.
Chicago, IL 60646

Craig H. Greenwood
Of Counsel

(312) 286-7986